E. R. Steubner, Inc. *and* Laborers Local No. 471, District Council of Eastern PA *and* Local 492, United Brotherhood of Carpenters and Joiners of America. Cases 4–CA–19750 and 4–CA–19750–2

November 24, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On September 24, 1992, Administrative Law Judge Thomas R. Wilks issued a decision finding that the Respondent did not violate Section 8(a)(5), (3), and (1) as alleged in the complaint and an order dismissing the complaint. The General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief. On January 29, 1993, the National Labor Relations Board issued an Order remanding the case to the judge to make further credibility findings and to reconsider certain complaint allegations in light of the credibility findings.[1] On February 17, 1993, the judge issued the attached supplemental decision making credibility findings and adhering to his original findings and recommendations. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decisions and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions to the extent consistent with this Decision and Order.

The complaint alleges that the Respondent violated Section 8(a)(5) of the Act by subcontracting drywall installation in violation of its contract with Local 492, United Brotherhood of Carpenters and Joiners of America (the Union). The judge declined to find a violation, stating that it would be impossible to formulate a make-whole remedy because the carpenters who might have received the subcontracted Grafika project work cannot be identified. The General Counsel has excepted. We agree with the General Counsel.

The parties' 8(f) contract, which expired on April 30, 1991, contained a clause that is valid under the proviso of Section 8(e) of the Act. The clause provides that drywall subcontracting would be performed by employers signatory to a collective-bargaining agreement with the Union. The Respondent admits that, between February and April 1991, it subcontracted about 10 days' worth of drywall work on its Grafika jobsite to a nonunion company in violation of this provision. Thus, unless the Union waived its rights under the contract, the Respondent's admitted action violates Section 8(a)(5).[3]

The waiver of a statutory right must be clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). Further, a union's past practice of permitting unilateral changes or contract modifications does not constitute a waiver of the union's right to bargain over such changes or to insist upon adherence to the contract. *NLRB v. Miller Brewing Co.*, 408 F.2d 12 (9th Cir. 1969); *Owens-Corning Fiberglas*, 282 NLRB 609 (1987).

In this case, there is no evidence that the Union consented to the Respondent's violation of the contract's subcontracting provision. On the contrary, the Union protested the Respondent's action before bargaining for a new contract began and decided to address the matter during the upcoming negotiations. That the parties failed to resolve the matter during negotiations does not constitute a waiver.

In the past, the Respondent has violated the contract provision and the Union has protested. Each time the parties have managed to settle the dispute. We do not believe the Union's past practice constitutes acquiescence to the Respondent's violation of the contract provision. In any event, as Board precedent makes clear, a union's acquiescence in previous unilateral conduct does not necessarily operate in futuro as a waiver of its statutory rights under Section 8(a)(5).

In sum, the General Counsel has established a violation of Section 8(a)(5) in this case.[4]

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having unlawfully subcontracted work in violation of its collective-bargaining agreement with the Union, shall make whole the employees deprived of the work for any loss of earnings and other

[1] The Board's Order is not included in bound volumes.

[2] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In affirming the judge's discrediting of the testimony of employee Keary Bortz, we find it unnecessary to rely on Bortz' dating of the Pagoda jobsite discussion with Construction Coordinator James Radwanski.

[3] See *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. 843 F.2d 770 (3d Cir. 1988).

[4] Contrary to the judge's finding, the potential difficulty in identifying the beneficiaries of a make-whole order is not a basis for dismissing the complaint. As the Ninth Circuit stated in an analogous context, ''In short, we do not think that the difficulties that the General Counsel may have in identifying discriminatees makes an award of backpay any less appropriate. Such a matter merely affects the scope of the remedy and not the nature of the violation.'' *NLRB v. Iron Workers Local 433*, 600 F.2d 770, 779 (9th Cir. 1979). We shall leave to the compliance stage of this proceeding the identification of the carpenters who would have received the Grafika project work but for the Respondent's unlawful subcontract assignment.

benefits, plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, E. R. Steubner, Inc., Reading, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Subcontracting work in violation of its collective-bargaining agreement with the Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole employees deprived of work by the unlawful contracting out of the drywall work at Grafika Printing, in the manner set forth in the remedy section of this Decision and Order.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its facility in Reading, Pennsylvania, copies of the attached notice marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Sign and return to the Regional Director sufficient copies of the notice for posting by Local 492, United Brotherhood of Carpenters and Joiners of America, if willing, at its union hall and at all other places where notices to members are customarily posted.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations not found here.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT subcontract work in violation of our collective-bargaining agreement with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole employees, deprived of work by our unlawful contracting out of the drywall work at Grafika Printing, for any loss of wages and benefits, plus interest.

E. R. STEUBNER, INC.

Richard P. Heller, Esq., for the General Counsel.
Thomas R. Davies, Esq. (Harmon & Davies), of Lancaster, Pennsylvania, for the Respondent.
Bruce E. Endy, Esq. (Spear, Wilderman, Borish, Endy, Brownine & Spear), of Philadelphia, Pennsylvania, for Laborers Local No. 471.
Leon Ehrlich, Esq. (Ehrlich & Ehrlich), of Reading, Pennsylvania, for Carpenters Local 492.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge. On September 24, 1992, I issued a decision in this case wherein dismissal of the entire complaint was recommended, inclusive of all allegations of Section 8(a)(1), (3), and (5) of the Act. On January 29, 1993, the Board issued an order remanding this case to me for the limited purpose of making specific, explicit credibility resolutions with respect to the issue of the alleged coercive interrogations and promise of benefit by Respondent Agent James Radwanski directed at Carpenters employee Keary Bortz on April 17, 1991, at the Pogoda jobsite, as discussed at pages 7 and 8 of my decision. The Board noted that although I made preliminary credibility findings, I deferred evaluation of the probative value of Bortz' testimony. Subsequent to my discussion of Bortz' credibility, I considered, seriatim, the evidence adduced in support of

other allegations of 8(a)(1) violations of the Act, and made specific findings.

On page 27 of my decision, I found that the testimonial evidence of all coercion adduced by the General Counsel was not credible for reasons delineated therein, and I recommended dismissal of all allegations of 8(a)(1) violations, inclusive of unlawful interrogation and promises of benefits. Those conclusions and underlying reasons were intended to encompass the testimony of Bortz, but, unfortunately, his testimony was not explicitly alluded to by me in that analysis.

Conclusions

The Board has ordered that I make specific findings as to the probative value of Bortz' testimony. I find that his testimony was subject to the deficiencies that marked that of other General Counsel witnesses, i.e., it was ambiguous, generalized, conclusionary, in part inconsistent, context free and unconvincing.

More specifically, I find that although there was more to the conversation than testified to by Radwanski, the testimony of Bortz was of insufficient probative value and not credible. His demeanor on the witness stand was such as to convince me that he was narrating a superficial conclusion as to what was stated by Radwanski. It cannot be ascertained from his direct examination testimony what turned the conversation from business matters to the subject of the ''Union,'' i.e., was it something suggested by Bortz himself or by Radwanski? Furthermore, it is not clear from direct examination whether Radwanski discussed the subject of Bortz' union membership or whether Radwanski had, as other employee testimony indicated, referred to Respondent's intention to withdraw from its status of an 8(f) employer, and an inquiry whether Bortz would remain employed for a non-8(f) employer.

Even according to Bortz, Respondent expressed no animus toward union members and explicitly stated an intent to utilize union members sent by the union job referral hall. Furthermore, Bortz referred to an expressed desire by Radwanski for Bortz' continued employment and to Bortz' potential to work his way up to foreman status.

Bortz' testimony is also too unclear and ambiguous to support a finding that Radwanski coercively interrogated Bortz as to his intention with respect to financial core membership, or that Radwanski promised Bortz a foreman's position on condition that he became a financial core union member.

Bortz' testimony regarding the reference to financial core membership is unreliable. The purported interrogation about financial core membership by Radwanski is inconsistent, generalized and conclusionary, i.e., ''[Radwanski] asked me about core membership.'' Unanswered is what context gave rise to that question, just how and in what manner did Radwanski question Bortz, what was the precise question put to Bortz, what did Bortz precisely say before and after the question? In direct examination, Bortz testified that he responded to Radwanski that he had already been informed about the nature of financial core membership from prevalent employee rumors. He testified that he heard rumors of financial core ''papers'' being circulated. Yet, inconsistently in cross-examination, he admitted that those rumors related to Respondent's going ''non-union,'' i.e., withdrawing from an 8(f) contractual status, and did not relate to financial core membership letters. Bortz testified it was he who asked Radwanski about Respondent's intention with respect to its 8(f) contractual status. This admission clouds Bortz' testimony to the extent that doubt is raised as to whether Radwanski initiated the interrogation. I therefore find Radwanski's testimony credible that the conversation was initiated by Bortz and consisted, at least in part, of Bortz' interrogative of Radwanski as to Respondent's intention to discontinue its contractual relationship with the Union as an 8(f) employer, and the impact on Bortz' status as an employee. I find that Radwanski replied more than ''I have no idea,'' and at least assured Bortz of his status of an employee with foreman potential should he choose to remain employed by a non-8(f) contractual employer. I find nothing coercive in such conversations. Therefore, in an unspecified manner, in a context of a discussion related to Respondent's intention regarding its 8(f) contractual relationship with the Union, according to Bortz, the conversation somehow turned to the subject of financial core membership for which Radwanski admittedly did not solicit his written application then nor thereafter, but rather merely gave a generalized description of it.

Finally, as noted in the decision, there is no complaint allegation of a promise of benefit at the Pogoda jobsite, and unrefuted evidence discloses that the jobsite had been completed well before April 17, the date recalled by Bortz.

Because of the deficiencies and the uncertainties in Bortz' testimony, I cannot find sufficient probative value, nor credibility on which to base a finding that an unlawfully coercive conversation occurred between Bortz and James Radwanski on or about April 17, 1991.

[Recommended Order for dismissal omitted from publication.]